distinction between legal primary and illegal secondary picketing, or to instruct the jury members that they could not take into consideration any losses incurred as a result of the picketing at Overnite's primary premises. (R. 339). The trial court did charge generally that the jury could not find in favor of the plaintiff for any damages which might have resulted solely from picketing the terminals of Overnite Transportation Company, but it made no distinction as to picketing at other terminals or as to what constituted protected, as distinguished from proscribed, picketing. (R. 339-68). Although the damages flowing from those places where picketing was carried on could easily have been segregated, particularly damages claimed at Atlanta, Savannah, Columbia, Charleston, and Richmond, plaintiff made no attempt to do so, but based its claim for damages on all of the strike and picketing activities and resulting expense shown by the evidence, this constituting "one ball of wax," as plaintiff put it. (R. 255).[3]

In his argument to the jury, counsel for plaintiff claimed compensatory damages in the full amount of $363,193, relying on the testimony respecting the extra costs and

[3] That the damages were readily severable is quickly seen from the example of the picketing at Atlanta, Savannah, Columbia, Charleston and Richmond. In those cities the evidence showed only peaceful primary picketing at Overnite's own terminals and there was no evidence whatsoever of any secondary picketing at or near the premises of any neutral employer or any inducement, other than the mere presence of the picket sign, of employees of neutrals to cease handling or delivering Overnite freight. Over two-thirds of the total damages claimed and granted Overnite consisted of the excess labor cost item of $232,837 occasioned by Overnite's being required to hire new employees to handle and deliver freight not handled or delivered by those refusing to cross the primary picket line, and two-thirds of Overnite's total freight was handled at the above five terminals. (R. 241-245, 263, 264). Overnite had records of how many new employees were employed and the amount of their wages at each terminal. (R. 226). Thus simple arithmetic would serve to substantially reduce the verdict in respect to this one item alone; similarly with the item of $51,759 for claims of damages to freight allegedly caused by the inexperienced new employees at each terminal. This again is allocable by terminals, and surely the union is not responsible for any such costs at terminals such as Atlanta where all the union activity was legal any more than it would be liable for any other costs or expenses that an employer might be put to in the course of a lawful strike.

expenses which Overnite had incurred wherever any picketing whatsoever was carried on. (R. 338). The jury entered a verdict in that exact amount. Defendant thereupon moved to set aside this verdict on the ground that it was excessive as a matter of law, (R. 15) but the trial court denied this motion, to which exception was made and error assigned. (R. 609-10).

During the trial plaintiff, in support of its claim for punitive damages, was permitted, over defendant's objections, (R. 58, 65-8, 165-175, 178, 479-500) to introduce evidence of four restraining orders issued by Federal Judge Wilson Warlick in actions brought by Overnite against other motor carriers, in which that Judge found that the refusal of these carriers to accept interchange freight during the Overnite strike was a violation of their duties as common carriers and in which the Judge restrained these carriers from further refusals. These refusals were the same which the plaintiff alleged were caused by the wrongful conduct of the defendant. The trial court, over objection, (R. 115, 175-7, 465-6, 470, 472, 474) then permitted evidence of a contempt conviction of the petitioners and one of its alleged representatives, Rutledge, for violating these restraining orders. In addition, the trial court permitted reference, over objection, to certain proceedings against various local unions affiliated with petitioner, but not petitioner, before the NLRB involving this same picketing, in which that Board had found the picketing of the Overnite trucks by these locals to be in violation of the Taft-Hartley Act. (R. 475-477). Finally, Overnite, over petitioner's objections, (R. 47-51) introduced evidence of petitioner's net worth. (R. 338). All this evidence was introduced and admitted solely on the theory that it tended to show malice as bearing on the issue of punitive damages. (R. 146, 473-5). The jury returned a verdict of punitive damages in the full and exact amount requested by plaintiff, namely $500,000.

Petitioner then filed appropriate motions and exceptions, which specifically raised, among others, the issues in this

case[4] and appealed to the Supreme Court of North Carolina, again raising these issues among others.[5] (R. 28, 31).

On May 2, 1962 that court handed down its decision in which it held that punitive damages could not be claimed or awarded in a suit predicated, as the present one, solely upon allegations of a violation of Section 303, but rejected all other of petitioner's contentions. The Court's opinion did not discuss petitioner's contention that it could not be held responsible for damages flowing from peaceful primary picketing, or its contention that the admission of prejudicial evidence in support of plaintiff's claim for punitive damages required the granting of a new trial.

On June 8, 1962, a Petition for Rehearing was filed with the Supreme Court of North Carolina, again particularly raising the above two contentions, (R. 630), and on July 9, 1962, that Petition was denied. Under the North Carolina procedure, the petition for rehearing was filed with two Justices; one concluded that a rehearing should be granted

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[4] Exceptions taken to failure of the Court to properly charge the jury that they could not take into consideration any losses incurred as a result of primary-picketing. Exceptions 444, 445 and 452 (R. 372, 375). Exception taken to denial of the Motion to Set Aside the Verdict—Exception 468 (R. 421). Exception taken to the failure of the court to set aside the verdict on the ground that compensatory damages found by the jury are excessive as a matter of law—Exception No. 477. (R. 423). Exception taken to the verdict on the ground of insufficient evidence to sustain the verdict as to all issues—Exception No. 468 (R. 421). Exception taken on the ground that there was insufficient evidence to sustain the verdict as to the amount of compensatory damages—Exception 472. (R. 422). Objection made and exception taken to the receipt of evidence as to actions occuring in Atlanta, Georgia, and Savannah, Georgia, and alleged damages resulting therefrom on the ground that there was no evidence that any of said damages resulted from secondary activities—Testimony of Harold R. Simmons, Exceptions No. 242 to 263. (R. 200 to 205). Testimony of William D. Croft, Exceptions 264 to 300. (R. 206 to 215). Testimony of Fred W. Thacker, Exceptions 301 through 309. (R. 217, 218).

[5] Exception taken to failure of the Court to properly charge the jury that they could not take into consideration any losses incurred as a result of primary picketing. Assignments of error X-d thru X-f (R. 578 thru 580). Exception taken to denial of the motion to set aside the verdict. Assignments of error number XVI-e (R. 612). Exception taken to the verdict on the ground of insufficient evidence to sustain the verdict as

and the other that it should not be. Under the procedure of that court, this results in a denial of the motion for rehearing. (R. 646).

REASONS FOR GRANTING THE WRIT

I

This case involves a state court application of Section 303 of the National Labor Relations Act which has resulted in the granting of damages for activities not proscribed by that Section with resulting impairment of federally protected rights. The courts of North Carolina have decided substantial federal questions importantly affecting the national labor policy as expressed in that Section in a manner completely inconsistent with the decisions of this Court. The state courts have construed and applied a federal law, Section 303, contrary to the application and construction of the counterpart to that Section, namely, Section 8 (b) (4) as made by the National Labor Relations Board, the

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to all issues. Assignment of error XVI. (R. 609-611). Exception taken on the ground that there was insufficient evidence to sustain the verdict as to the amount of compensatory damages. Assignment of error XVI-b. (R. 611). Objection made and exception taken to the permission of evidence as to actions occurring in Atlanta, Georgia, and Savannah, Georgia, and alleged damages resulting therefrom on the ground that there was no evidence that any of said damages resulted from secondary activities. Assignment of error X. (R. 211-215; 217-221). Exception taken to the action of the Court in permitting testimony and statements of counsel in the presence of the jury informing the jury that the defendant and its alleged agent, Hugh Rutledge, has been tried and convicted of a criminal charge in Judge Warlick's Federal Court. Assignment of error II, II-a, and II-c. (R. 465, 472). Exception taken to the failure to declare a mistrial because of argument of plaintiff's attorney in a speech to the jury in which he told the jury that the National Labor Relations Board had obtained a restraining order against the Teamsters Union arising out of said strike. Assignment of error II-f (R. 475, 477). Exception taken to the admission into evidence over objection of four Orders of Judge Wilson Warlick, Exhibits 20, 32, 33 and 35, (R. 481-483), and in admitting testimony of various witnesses relating thereto. These orders were injunctions of Judge Warlick arising out of this strike. Assignments of error IV to IV-e. (R. 479-500). Exception taken to the introduction through the witness Hanna of evidence of the contempt proceeding involving Rutledge. Assignment of error No. II. (R. 465-467).

lower federal courts, and this Court, all of which require the separation of legal from illegal picketing for purposes of injunction or damages. Further, the state courts have applied Section 303 in a manner which would operate to penalize unions and their members for exercising rights of peaceful picketing specifically protected under that same federal law and under the Federal Constitution. If this application of Section 303 is to stand, then principles of federal preemption are easily frustrated and federally protected rights of peaceful picketing are readily impaired. Further, the encouragement which the instant case will inevitably give, indeed has already given,[6] to the institution of suits for heavy damages in any labor dispute where otherwise legitimate primary picketing is accompanied by instances of alleged illegal secondary picketing can result in the crippling, if not the destruction, of all labor organizations thus involved. Unless this misapplication of Section 303 is corrected by this Court, that Section, designed by Congress as a means for compensating employers for losses actually incurred as a result of illegal secondary picketing, can become an instrument to impair federally protected rights and to harrass and disable labor organizations. When, as here, the highest court of a state has refused to apply federal law according to its terms, and instead has applied it to punish for the exercise of federal rights, all contrary to decisions of this Court, it is fitting that this Court afford relief.

II

The grave consequences of a misapplication of Section 303 by the state courts are well illustrated by the instant case. A peacefully conducted and otherwise legal primary

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[6] Since the filing of the complaint in the instant case two other cases have been filed by two other carriers in this same state court. *New Dixie v. International Brotherhood of Teamsters*, Superior Court, Mecklenburg County, N. C., S.D. No. 38-183; *Jocie Motor Lines, Inc. v. International Brotherhood of Teamsters*, Superior Court, Mecklenburg County, N. C., S.D. No. 38-184. Both cases were filed in May of 1960 and are now awaiting trial.

strike and picketing against Overnite's principal place of business in Atlanta, as well as at various of Overnite's own terminals in other cities in the middle-southern states, resulted in the refusal by some of Overnite's employees and the employees of neutral employers to cross the picket line to handle Overnite freight, or interline with Overnite. This conduct was entirely legal even though petitioner had no certification and even if it be assumed it represented less than a majority of Overnite's employees. *NLRB v. Teamster Local 639 (Curtis Bros.)*, 362 U.S. 274.[7] The conduct was legal even though the inducements to respect the picket line were made orally and away from the picket line. *Teamsters Local 901 v. NLRB (Gonzales Chemical Co.)* 293 F2d 881 (D. C. Cir. 1961) *and Milwaukee Plywood v. NLRB*, 285 F2d 325 (7th Cir. 1960).

In addition to the above activity, Overnite trucks were followed and picketed when they stopped to load or unload at other and separate terminals or places of business owned or operated by neutral employers. For the purpose of this case, this activity can be considered illegal, the Board as then constituted having so held in respect to this very picketing as carried on by local unions affiliated with petitioner. *Overnite Trucking Co.*, 130 NLRB No. 108.[8]

At the trial, Overnite, over objection, was permitted to introduce evidence of the lawful peaceful primary picketing activities at Overnite's own premises and terminals and to show the damages resulting from such picketing. This damage amounted to over two-thirds of the total actual

[7] The North Carolina Supreme Court's basic misconception of the prohibitions contained in Section 303 is seen by the statement in its opinion that "the cause of action arose by reason of the defendant's unlawful activities and demands for a contract without its prior designation as the bargaining agent for the plaintiff's employees." The cause of action in this case arose prior to the Landrum-Griffin amendments to Taft-Hartley Act and the enactment of 8(b)(7) thereof which, for the first time, arguably made certification a prerequisite to lawful recognition picketing.

[8] The Board as presently constituted considers this type of picketing, standing alone and not including, as in this case, other secondary inducements, to be legal. *United Plant Guard Workers*, 136 NLRB No. 9 (March 5, 1962).

damages claimed by Overnite. Notwithstanding the defendant's vigorous objections, the jury was permitted to consider and include such damages in the verdict it finally rendered in Overnite's favor, such damages being the exact sum claimed by Overnite to have been caused by all picketing at all places, including the primary picketing. Although the damages flowing from the alleged illegal picketing were easily severable from the damages flowing from the legal picketing, neither plaintiff nor the state courts below, although requested to do so by defendant, made any attempt to confine the damages to the picketing which alone constituted a violation of Section 303.

As a final misapplication of that Section, the jury was permitted to hear and consider evidence of an inflammatory and prejudicial nature introduced and admitted soley to support a showing that defendant had acted maliciously and thus could be assessed punitive damages. On appeal, the Supreme Court of North Carolina held that a claim for punitive damages was not allowable in a suit under Section 303, but, nevertheless, declined to correct the mischief done by the introduction of this prejudicial evidence by directing a new trial. Whatever might be the rule as to the admissibility of evidence in proceedings brought under state laws,[9] it would seem that in suits brought under a cause of action created by Congress the parties should be held to a strict rule. See *United Mine Workers v. Patton*, 211 F2d 742 at 751 where the Fourth Circuit Court of Appeals held that the admission of similar evidence of malice was reversible error in a suit under Section 303. In any event it would appear intolerable that Section 303 be converted by a state court into an instrument of oppression either by a rule of evidence or by an application which results in both the granting of excessive and unwarranted damage awards and the impairment of federally protected rights.

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[9] See, however, *Hinson v. Dawson*, 244 N.C. 23, which indicates that under North Carolina law the trial court committed reversible error by admitting such evidence.

III

Both the terms of Section 303 itself and the safeguarding of federally protected rights require the separation of damages in this case. This Court, in *International Rice Milling v. NLRB*, 341 U.S. 665 (1951) held that Section 8(b)(4) of the Act—the counterpart to Section 303—does not proscribe peaceful primary picketing even though an object thereof is to dissuade all persons from entering the premises of the struck employer. In *Curtis, supra*, this Court held that the right of peaceful primary picketing finds affirmative protection under Sections 7 and 13 of the Act, as indeed it does as well under the Federal Constitution. *Thornhill v. Alabama*, 310 U.S. 88 (1940) and *Teamsters Local 795 v. Newell*, 356 U.S. 341 (1958). Thus, Section 303 can be applied *only* to prohibit secondary, not primary, picketing.

More directly to the point, this Court in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, gave assurance that the picketing protections of the Bill of Rights would not "be defeated by insubstantial findings of fact screening reality," and that the Court reserved to itself, "power to search the records in the state courts where a claim of constitutionality is effectively made," (312 U.S. at 293). That case involved a situation where violent picketing was inextricably intermingled with peaceful picketing with a resulting ban on all picketing. Here there was no such intermingling and the picketing activities nd resulting damages were severable. In *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, this Court indicated the necessity for separating legal labor activities from illegal where punishments or prohibitions were being imposed. The Court stated:

> "Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the preempted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by

petitioners. The picketing proper, as contrasted with the activities around the headquarters, was peaceful. There was little, if any, conduct designed to exclude those who desired to return to work. Nor can we say that a pattern of violence was established which would inevitably reappear in the event picketing were later resumed. What violence there was was scattered in time and much of it was unconnected with the picketing." (355 U.S. at 139).

Various of the federal Circuit Courts of Appeal have specifically held that it is the duty of the National Labor Relations Board and the courts, when confronted with alleged violations of Section 8 (b) (4), or 303, to seek to restrain or allow damages for only those picketing activities which the record shows constitute a violation of these Sections, and to refrain from entering orders which may sweep or include the good with the bad. These same cases hold that effective inducements to respect a primary picket line, whether accomplished by the mere presence of the picket sign or by oral entreaty, do not constitute a violation of Section 8 (b) (4). *Seafarers International Union v. NLRB*, 265 F2d 585 (D. C. Cir. 1959); *Teamsters Local 984 v. Humko Co.*, 287 F2d 231 (6th Cir. 1961), cert. den. 366 U.S. 962; *Milwaukee Plywood v. NLRB*, 285 F2d 325 (7th Cir. 1960); *Chauffeurs Local 175 v. NLRB (McJunkin Corp.)*, 294 F2d 261 (D. C. Cir. 1961); *Local 978 Carpenters v. Markwell*, 50 LRRM 2742 (8th Cir. 1962). In *Humko, supra*, the court stressed the necessity in a case under Section 303 to separate all damages flowing from legal picketing activity from the damages resulting from illegal picketing activity.

In the courts below, respondent relied upon a decision of the 9th Circuit in *Carpenters Local 131 v. Cisco Construction Co.*, 266 F2d 365, cert. den. 361 U.S. 828, to support the totalling of the damages. In that case, the court set forth a "totality of effort" theory under which it permitted recovery under Section 303 for damages resulting from both legal and illegal picketing where the picketing was conducted at a common situs at which the

primary employer, as well as many neutral employers, were at work, and where the lawful and unlawful picketing was so intermingled as to make it difficult, if not impossible, to separate the two.[10] Even in such circumstances of common situs, which are not present here, the Ninth is the only court of appeals to give support to that concept, and other circuits have repudiated it. *Milwaukee Plywood, supra, McJunkin Corp., supra.* The prevailing rule, and the only rule consistent with decisions of this Court, is stated in *McJunkin* as follows: "But peaceful primary picketing and its normal incidents, including requests to neutrals not to cross the picket line, cannot be forbidden though the union has acted illegally elsewhere." (294 F2d at 262).

IV

In *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957) this Court concluded that in collective bargaining contract suits under Section 301 of the National Labor Relations Act substantive federal labor law must be applied, fashioned by the policy of the national labor laws. The rationale of *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), and of the more recent decisions of this Court in *Teamsters Local 174 v. Lucas Flour Co.,* 7 L ed 2d 593 (1962), and *Sinclair Refining Co. v. Atkinson,* 8 L ed 2d 440 (1962) indicate that this same policy is applicable to suits under Section 303 of the National Labor Relations Act. The courts below have applied their own, not federal, concepts to the construction and application of Section 303. Thus the necessity for conforming the

[10] This Court has previously denied petitions for certiorari in two other comparable cases under Section 303. They are *UMW v. Osborne Mining Co.,* 279 F2d 716 (6th Cir. 1960), cert. den. 364 U.S. 881; *Gilchrist v. UMW,* 290 F2d 36 (6th Cir. 1961), cert. den. 368 U.S. 875. *Osborne* and *Gilchrist,* unlike the present case, involved a claim under state common law for tortious, violent conduct entitling the plaintiffs to punitive damages, in addition to a cause of action under Section 303; and there was proof of considerable violence and other common law tortious action, not protected or proscribed by the National Labor Relations Act. In both these cases, unlike the present one, the primary and secondary picketing activities were inseparable and so found by the court.

application of Section 303 to federal labor law demonstrates the need for the intervention of this Court in the instant case. While this Court has undertaken to clarify the law in respect to the construction and application of Section 301 as well as Section 8 (b)(4) of the National Labor Relations Act, it has heretofore had no occasion to pass upon the construction and application of Section 303. That Section has inherent in it problems peculiar to it in the field of damages and which are present in this case, namely the intermingling of damages arising from legal picketing with damages arising from illegal but separate picketing and the introduction of prejudicial evidence having no relevance to any issue cognizable in litigation under Section 303. It is respectfully submitted that for those reasons the instant case affords an appropriate vehicle for review by this Court.

V.

The failure of the North Carolina courts to restrict damages to those resulting from picketing proscribed by Section 8 (b) (4) as interpreted and applied by the Labor Board and the federal courts, further raises an important issue of preemption. This Court, in *Garmon, supra,* made it quite clear that there is no room for state intrusion, whether it be by injunction, damage award or other remedy, in those areas of labor activity which are protected by the National Labor Relations Act. See also *Youngdahl, supra.* Sections 303 and 8 (b)(4) proscribe only certain rather narrowly defined peaceful strike and picketing activity; all other is protected. To permit a state court to use a section of the National Labor Relations Act to grant a damage award for protected labor activity is to fly in the face of all that *Garmon* teaches, and is to afford a ready means of avoiding the principle of federal supremacy. In this case, no less than in *Garner v. Teamsters, Local 776,* 346 U.S. 485 (1953), *Weber v. Anheuser-Busch,* 348 U.S. 468 (1955), and *General Drivers, Warehousemen and*

Helpers, Local Union 89 v. American Tobacco Co., Inc., 348 U.S. 978 (1955), the supremacy clause of Article VI of the Federal Constitution requires that the judgment of the courts below be set aside and the case remanded for further proceedings consistent with the preemption principles announced by this Court in the foregoing cases.

CONCLUSION

It is respectfully submitted that, for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix "A"

IN THE SUPREME COURT OF NORTH CAROLINA
SPRING TERM, 1962

Overnite Transportation Company *v.* International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America	No. 245—*From Mecklenburg*

Appeal by the defendant from Pless, J., November 13, 1961, Regular "A" Civil Term, Mecklenburg Superior Court.

In this civil action the plaintiff seeks to recover damages, actual and punitive, alleged to have been caused by the defendant's unfair labor practices in calling and maintaining a strike and secondary boycott designed to compel the plaintiff, and unorganized trucking company, to recognize the defendant as the bargaining agent for the plaintiff's employees.

Summons was issued against the defendant and served on the Secretary of State on September 3, 1959. The plaintiff filed and also served on the Secretary of State the following verified complaint:

"The plaintiff, complaining of the defendant, says and alleges:

"(1) That the plaintiff is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, and maintains one of its principal offices and places of business at Charlotte, North Carolina.

"(2) That the plaintiff is a common carrier, engaged in the business of transporting freight by motor vehicle.

"(3) That the defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is, as the plaintiff is informed and believes, an unincorporated labor organization or Union.

"(4) That the plaintiff derives its revenues and profits from handling and transportation of direct freight, which is a freight transported from origin to destination entirely by the plaintiff, and from handling and transportation of interchange freight, which is freight not transported from origin to destination entirely by the plaintiff but interchanged between the plaintiff and other Trucking Companies and transported part of the way from origins to destination by the plaintiff and part of the way by such other interchange Companies.

"(5) That on or about May 17, 1959, the defendant called a strike against the plaintiff for the purpose of forcing or requiring the plaintiff to recognize or bargain with the defendant as the representative of plaintiff's employees, although the defendant had not been certified as the representative of the plaintiff's employees by any Governmental agency or authority whatever.

"(6) That the defendant was not able to accomplish such purpose by the direct pressure of such strike upon the plaintiff, for despite such strike the great majority of the plaintiff's employees continued at work with the plaintiff and despite such strike the plaintiff remained ready, able and willing to render its common carrier services as it had been doing theretofore.

"(7) That the defendant, however, by an additional means and device, has prevented the plaintiff from carrying on its business in a normal way, thereby damaging the plaintiff as hereinafter set forth; that such means and device which the defendant has thus used against the plaintiff has been as follows: That the defendant has induced and encouraged the employees of the plaintiff's customers and employees of the aforesaid Trucking Companies doing interchange freight business with the plaintiff to engage in a concerted refusal, in the course of their employment, to transport or otherwise handle any goods, articles, materials, or commodities going to or coming from the plaintiff; that the object of such inducement and encouragement of the employees of the plaintiff's customers and said employees of said Trucking Companies was to force and require the said customers and Trucking Com-

panies to cease doing business with the plaintiff and to force and require the plaintiff to recognize or bargain with the defendant as the representative of plaintiff's employees, although the defendant, as stated above, had not been certified as the representative of the plaintiff's employees by any Governmental agency or authority whatever.

"(8) That such action on the part of the defendant was wrongful and in violation of law and was taken by the defendant for the willful, deliberate and malicious purpose of injuring and damaging the plaintiff; that as a result of such action on the part of the defendant, the plaintiff has been shut off from and deprived of freight business which otherwise and normally the plaintiff would have profitably handled and has been required to pay out large sums of money for extraordinary expenses incurred by the plaintiff in its efforts to secure, handle and transport freight shipments and otherwise operate its business despite the wrongful and unlawful acts of the defendant hereinabove set forth; and that in this manner and by this means the plaintiff has been grievously injured and damaged by the defendant.

"(9) That by reason of the matters hereinabove set forth the plaintiff has been injured and damaged by the defendant in the sum of $500,000.00 and is entitled to judgment against the defendant in that amount, and by reason of the defendant's deliberately, willfully and maliciously inflicting such injury and damage upon the plaintiff as hereinabove set forth, the plaintiff is entitled to judgment for punitive damages against the defendant in an additional sum of $500,000.00.

"(10) The acts of the plaintiff in the operation of its business described above affects interstate commerce within the meaning of the Labor Management Relations Act (29 U.S.C. 151, et seq.), and jurisdiction of this cause is conferred upon this Court by Section 303(b) of said Act (29 U.S.C. 187 b).

"WHEREFORE, the plaintiff prays for judgment against the defendant in the sum of $1,000,000.00, together with the cost of this action; and the plaintiff prays the Court for such other and further relief as the Court may deem just and proper."

After the court disposed of preliminary motions, the defendant, on September 29, 1960, filed the following verified answer:

"The defendant, answering the plaintiff's complaint, says:

"1. Paragraph 1 of the plaintiff's complaint is admitted.

"2. Paragraph 2 of the plaintiff's complaint is admitted.

"3. Paragraph 3 of the plaintiff's complaint is admitted.

"4. Answering paragraph 4 of the plaintiff's complaint, the defendant says that it is informed and believes that the plaintiff derives its revenues and profit at least in part from the handling and transportation of direct freight, and in part from the handling and transportation of interchange freight. Except as herein specifically admitted the defendant does not have information sufficient from which to form a belief as to the truth of the plaintiff's allegations and the same are therefore denied.

"5. Paragraph 5 of the plaintiff's complaint is untrue and denied. Upon information and belief, the dispute and such stoppages of work as occurred in the plaintiff's places of business were caused by and resulted from the plaintiff's unfair labor practices and wrongful acts toward and against its employees and their local union.

"6. Answering paragraph 6 of the plaintiff's complaint, it is denied that this defendant sought to accomplish any such purpose as that set forth in the plaintiff's complaint by pressure either direct or indirect, and the allegations of paragraph 6 of the plaintiff's complaint, upon information and belief, are untrue and denied.

"7. Paragraph 7 of the plaintiff's complaint is untrue and denied.

"8. Paragraph 8 of the plaintiff's complaint is untrue and denied.

"9. Paragraph 9 of the plaintiff's complaint is untrue and denied.

"10. Paragraph 10 of the plaintiff's complaint is untrue and denied.

"WHEREFORE, having fully answered the plaintiff's complaint, the defendant prays that the plaintiff have and recover nothing; that this cause be dismissed, and that the plaintiff be required to pay the costs of this action."

The evidence tends to show that Overnite Transportation Company (hereafter called Overnite) is a Virginia corporation duly licensed by the Interstate Commerce Commission and by the licensing authorities of Virginia, North Carolina, South Carolina, and Georgia, to engage in the transportation of freight by motor vehicles in those States. The plaintiff maintained 33 terminals, among which the following are perimeter or gateways: Richmond, Virginia, Asheville, Charlotte, and Winston-Salem, North Carolina, Greenville and Columbia, South Carolina, and Atlanta, Georgia. At the time complained of, Overnite employed approximately 1,500 men. Its average monthly freight carriage was approximately 111,000,000 pounds, 60 per cent of which was freight picked up and delivered within its territory. The remaining 40 per cent was exchange freight, that is, (1) shipments originally received by Overnite to be transferred to other carriers for delivery, and (2) shipments received from other carriers to be delivered by Overnite. The exchanges were made pursuant to agreements. Overnite has exchange agreements with approximately 150 other carriers.

Beginning in April, 1959, the defendant International began efforts to organize Overnite's employees. The activities began in Charlotte and spread throughout Overnite's entire system. The organization attempts met with little success. The union did not, by petition or otherwise, have the National Labor Relations Board call an election to select a bargaining agent for Overnite's workers. The union, however, made demands on the plaintiff to recognize it as the bargaining agent. Overnite refused. Immediately the strike began. Picket lines were established at plaintiff's terminals. Nevertheless the majority of plain-

tiff's employees continued to work and refused to honor the picket lines. Whereupon the union, through its members who were employees of other carriers, organized a boycott against movement of plaintiff's interchange freight. The union's contracts with other carriers contained clauses forbidding discharge for refusal to handle "hot cargo." Any union member who assisted in moving any freight routed over plaintiff's lines was reported to the union for discipline. As a result of the strike the volume of plaintiff's interchange freight fell off materially. In order to prevent complete stoppage of its interchange business, the plaintiff hired additional men, procured additional equipment, and obtained additional operating authority.

According to the testimony of Mr. Simmons, plaintiff's expert accountant, whose evidence will be discussed in the opinion, the plaintiff's excess cost of handling freight was $232,837.00. The cost of guard service to protect interchange freight, including the workers and their equipment during the strike, amounted to $16,662.00. Extra telephone and communication expenses amounted to $2,116.00. Extra cost in moving, including damage thereto, 20 million pounds of freight that normally would have been brought to Overnite's terminals by connecting lines amounted to $51,759.00. The extra cost of operating 23 additional trailers and nine additional tractors during the strike was $20,170.00. The above listed extra costs of operating the plaintiff's business do not take into account the loss of profits in reasonable contemplation during the period of the strike. Mr. Simmons testified that for the first four months of 1959 Overnite experienced a gross increase in its business of 22 per cent over the same period for the preceding year; that after the strike the rate of increase dropped to 16 per cent for the remainder of the year, and that the last eight months of that year should have shown a material increase.

At the trial the plaintiff introduced in evidence the defendant's constitution, Article I, Section 2, which states the purpose of the union to be "To organize under one

banner all workmen engaged in the craft, and to educate them to cooperate in every movement which tends to benefit the organization; . . ." The plaintiff likewise introduced a number of the union's agreements with lines which interchanged with plaintiff, relating to over-the-road transportation, the pickup, forwarding, and freight delivery service. The agreements protected from discharge union employees who refused to handle "hot cargo." The plaintiff introduced photostatic copies of the financial reports showing expenditures by the defendant, by its Joint Council No. 9, and by its several local unions in support of the strike. These reports showed expenditures by International and by Joint Council No. 9 and the local unions involved during the strike activities. The evidence tended to show that approximately $40,000.00 was contributed by International and by its Council No. 9 and by Local 391 which was in trusteeship and operated directly under the order of James R. Hoffa, President of the defendant. The total expenditures in support of the strike by International, by its Council No. 9, and by the local unions involved, exceeded $125,000.00.

The defendant introduced four witnesses, each of whom was a member of the defendant union. Each testified to his participation in the strike as a member of a local union. The testimony tended to confine the strike activities to the local unions and to disassociate International from responsibility. However, Mr. Cook, one of International's witnesses, testified: "The International Union will not pay out any money in support of a strike it does not sanction."

At the close of the evidence the court submitted four issues:

> "1. Was the plaintiff damaged by the wrongful actions of the defendant, as alleged in the complaint?
>
> "2. If so, what amount, if any, is the plaintiff entitled to recover of the defendant as actual damages?
>
> "3. Was plaintiff damaged by the reckless, wanton and malicious actions of the defendant, as alleged in the complaint?

"4. How much, if any, is plaintiff entitled to recover of defendant as punitive damages?

In apt time the defendant requested the court to give the jury special instructions:

"The Court charges you that; under Section 303 of the National Labor Relations Act, if the plaintiff is entitled to any damages at all, it is entitled to recover only those damages it has actually sustained and the cost of this action. Under Section 303, the plaintiff is not entitled to recover punitive damages. Consequently you are instructed to answer the fourth issue, referring to punitive damages with the word, 'None.'"

The Court declined to give the requested instruction, but did charge in part as follows:

"That issue (Third) ladies and gentlemen of the jury, refers to what are known as punitive damages. The Court instructs you, reading from . . . that if you find the conduct of the defendant in respect to this strike was reckless, wanton and malicious, that it was without regard to the rights of the plaintiff, then it would be within your discretion to include in your answer to the last issues a sum of money which you may deem proper as smart money, or punitive damages. You are not required by the law, notwithstanding what your findings as to fact may be, to include any punitive damages, but the whole matter as to whether or not you shall include punitive damages is left to your discretion, to your sound judgment, providing you shall find that the conduct of the defendant was reckless, wanton and malicious.

"Now, ladies and gentlemen of the jury, while every legal wrong entitles the party injured to recover damages, . . . sufficient to compensate for the injury inflicted, not every legal wrong entitles every party to recover exemplary or punitive damages. To warrant the allowance of such damages the act complained of must not only be unlawful, but it must also partake somewhat of a criminal or wanton nature."

The jury answered the first and third issues, Yes, the second issue, $363,193.00, and the fourth issue, $500,000.00. The court entered judgment that the plaintiff recover

$363,193.00 actual, and $500,000.00 punitive damages. The defendant excepted and appealed, assigning errors.

Blakeney, Alexander & Machen,
By: J. W. Alexander, Jr., Ernest W. Machen, Jr., for plaintiff, appellee.

Robinson, Jones & Hewson, Hunter M. Jones, Francis M. Fletcher, Jr., for defendant, appellant.

David Previant, Milwaukee, Wis., Herbert S. Thatcher, Washington, D. C., Edwin Pearce, John S. Patton, Joseph Jacobs, Atlanta, Georgia, of counsel.

Higgins, J.

Before us are 1,500 pages of record, exhibits and briefs. The defendant's assignments of error alone cover 165 pages of the record. They are based on 484 exceptions taken during the course of the long and hotly contested trial. Review in detail is not indicated. Procedural questions involving the service of process and motion to postpone the trial have been considered. They are without merit.

The plaintiff instituted this civil action in the Superior Court of Mecklenburg County to recover damages, both actual and punitive, alleged to have resulted from a strike and secondary boycott called by the defendant in an unlawful effort to compel the plaintiff to sign a union labor contract with plaintiff's employees. The plaintiff alleges its business "affects interstate commerce within the meaning of the Labor Management Relations Act." (29 U.S.C. 151, et seq.) Section 187(a) provides: "It shall be unlawful for the purposes of this section only, in an industry or activity affecting commerce for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . transport . . . any goods, articles, materials, or commodities . . . where an object thereof is— . . . (2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor

organization has been certified as the representative of such employees under the provisions of Section 159 of this title; . . . (b) whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and the cost of the suit." (Note: Section 187(a) seems to have been amended effective September 14, 1959, a date subsequent to the conduct complained of.)

The right to maintain the action and the jurisdiction of the State court to hear it arise by congressional grant. In fixing the rights and liabilities of the parties, the Superior Court on the trial, and this Court on appeal, must accept the interpretation the Supreme Court of the United States has placed upon the Acts of Congress here involved. Constitution of the United States, Article VI, Section 2; Constitution of North Carolina, Article I, Sections 3 and 5; State v. Davis, 253 N. C. 86, 116 SE 2d 365; Constantian v. Anson County, 244 N. C. 221, 93 SE 2d 163; Norris v. Telegraph Co., 174 N. C. 92, 93 SE 465.

Three basic questions are presented by the assignments of error: (1) The liability of International for the damages which proximately resulted from the strike. (2) Sufficiency of the evidence of actual damages to support the jury's finding. (3) Sufficiency of the pleadings and evidence to support an award of punitive damages. Discussion of these questions will necessarily involve the challenged portions of the court's charge with respect to them.

Its constitution states: The International Brotherhood of Teamsters, etc., shall consist of an unlimited number of local unions chartered by International. The stated purpose is "To organize under one banner all workman engaged in the craft, and to educate them to cooperate in every movement which tends to benefit the organization. . . . This organization has jurisdiction over all teamsters, chauffeurs, warehousemen and helpers; all who are em-

ployed on or around . . . automobiles, trucks, trailers, and all other vehicles hauling, carrying or conveying freight, merchandise, or materials." So complete is International's control over local unions that it may suspend the local charter and place the locals in trusteeship under the direct supervision of International's president. Indeed, even in this case, two of the locals, No. 55 and No. 391, involved in this strike, were in trusteeship, operating under the direct authority of James R. Hoffa, International President.

The evidence shows an agent of the union sent out "hot cargo" letters and addressed members of locals, particularly employed by Roadway Express, requesting them not to handle exchange freight for Overnite. The contribution to the expenses of maintaining the strike made by International, the active participation of its Locals Nos. 55 and 391, under trusteeship, and by its Joint Council No. 9, sufficiently show that International was using the locals as its hands and arms to carry on the strike throughout the area according to plans which originated in its own head. N.L.R.B. v. International Brotherhood of Teamsters, 267 Fed. 2d 870, *Certiorari* denied, 361 U.S. 914, Rehearing denied, 361 U.S. 945; Dairy Distributors, Inc. v. International Brotherhood of Teamsters, 8 Utah 2d 124, 329 P. 2d 414, *Certiorari* denied, 360 U.S. 909; United Mine Workers of America v. Patton, 211 Fed. 2d 742, *Certiorari* denied, 348 U.S. 824.

The evidence offered at the trial sufficiently established a principal-agency relationship between International and its local unions in fomenting the strike in order to force plaintiff, an unorganized freight carrier, to enter into an employment contract with the union. There is not a suggestion that the union had been designated or certified as a proper bargaining agent for plaintiff's employees. With respect to the principal-agency relationship, Judge Pless charged the jury:

> "Now, then, coming to the first issue: Was the plaintiff, referring to Overnite Transportation Company, dam-

aged by the wrongful acts of the defendant, as alleged in the Complaint? Now, that issue, ladies and gentlemen, will depend upon several factors. In the first place, the defendant, and you will remember that there is nobody here as party to this case except International Brotherhood which I have referred to as the union in the charge, is the only defendant, and it could be held responsible for what was done by others only in the event this was done in law as agent of the union. . . . To give you what is meant by agency, it is the relation which results where one party called the 'principal' authorizes another party, called an 'agent' to act for him or it. The relationship of principal and agent may be created by word of mouth, writing or implied, by consent or acquiescence. A servant is an agent of his master, to deal more generally with things rather than with persons. The distinguishing difference between an agent and servant is that an agent can contract for his principal and bind his principal contractually, whereas a servant cannot so bind in contract his master. Both principal and master are liable for the torts of their agents and servants when acting in the scope of their employment.

"A person is responsible for not only his own acts, but for the acts of his employees or his agent when they are done within the scope of their employment and in furtherance of the business which is entrusted to them. The test of the liability, in all cases, depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. The simple test is whether they were acts within the scope of his employment, not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him."

The parol testimony and the exhibits, interpreted in the light of International's constitution, clearly indicate the cords which joined the many locals together in the strike effort, binding them to act in close concert throughout the four states, were manipulated by International. The evidence was sufficient to warrant the jury in finding the plaintiff was damaged by defendant's wrongful acts.

The second question presents a somewhat more difficult problem. For proof of its actual damages, Overnite relied upon the testimony of its vice president and general manager and accounting supervisor, Mr. P. S. Simmons. After completing business college training and a course in financing, he became bookkeeper and cashier of Motor Transit Company, Raleigh. He was appointed terminal manager and then traffic manager dealing with cost analysis.

Upon returning from service he accepted employment by the North Carolina Utilities Commission and traveled throughout the State instructing motor carriers as to the method of keeping records, checking costs, and making the reports required by the Commission. He testified before the Commission in matters involving rates, etc. In 1951 he became assistant traffic manager for Overnite. "In addition to our own company's expense items and accounts in detail, I study and analyze, and compare with our own, rates reported of other carriers, . . . this information being obtained through . . . reports on file in the I. C. C. and various State commissions. . . . This is the kind of thing I deal in all the time. . . . I testified in various finance cases before the I.C.C. and the State commissions, . . . 60 or 70 times."

The evidence was sufficient to support the court's finding the witness was an expert in cost accounting. With respect to the weight to be given his testimony, Judge Pless instructed the jury:

> "Ladies and Gentlemen of the jury, in holding Mr. Simmons to be an expert in the field of cost analyses, the court does not mean by that, that you are bound by his testimony, nor should you give it any more credit than you would any other witness that appeared to be qualified, that is, it permits him to analyze and to some extent synopsize figures that would otherwise take a great deal of time. Of course, in that field, he is also permitted to express opinions that he would not be permitted to express were he not held to be an expert. However, none of these things are binding

upon you, you would treat him just as you would any other witness, to determine whether or not it is acceptable to you. The objection is overruled."

Mr. Simmons testified he kept a daily record of the costs of the strike to his company. He gave the gross revenue each year beginning in 1955 as $5,843,530.00, which had increased to $12,000,000.00 in 1959. In 1958 the profit return was 9.2 per cent. In 1959 it was 3.11 per cent. The witness did not have in court the original records. He examined the records in 33 terminals operated by Overnite during 1959. Synopsis sheets made by him or under his direction, gave composite of the original records. In summary he testified the following losses resulted from the strike: Excess labor costs, $232,837.00; guards, $16,662.00; loss and damage to freight, $51,759.00; Extra telephone and communications expense, $2,116.00; operating additional tractor-trailers, $20,170.00. The witness did not make a calculation showing the loss of profits during the term of the strike. However, counsel in the argument used the percentage of the net income fall-off during the strike which showed the loss to be $59,819.00. The jury accepted the evidence, including the calculation, and fixed plaintiff's actual damages at $363,193.00.

The one debatable item in the recovery is the loss of profits. "If a regular and established business is wrongfully interrupted, the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of. . . . in a case of this kind it is open to the plaintiff to show a loss of profit upon the issue of injury and damage to his business, if he is able to present evidence from which the jury may be able to draw a reasonably accurate conclusion, not based on conjecture or speculation, as to the extent of the injury inflicted and amount of damage caused." Steffan v. Meiselman, 223 N.C. 154, 25 SE 2d 626.

On the issue of actual damages, Judge Pless charged:

"I instruct you further that such actual damages, if any, allegedly sustained by the plaintiff must be proven

with reasonable certainty, although it is not required that such actual damages be proven with mathematical exactness or with absolute certainty unless the damages are such as are susceptible of definite or precise proof. However, in no event may an award of damages be based on conjecture, speculation or guess.

"In your consideration of what actual damages, if any, were sustained by the plaintiff in this case, you are not authorized to presume any such damages or base your decision thereon on guesswork or speculation, but you must look to the evidence as introduced in the trial of this case and determine whether a preponderance of the evidence shows, with reasonable certainty, that plaintiff, in fact, sustained any actual damages, and if so, you must then determine whether the evidence shows, with reasonable certainty, that any definite sum of such damages was sustained by the plaintiff.

"Recovery for the loss of future profits may be had where they are reasonably certain in character and are the proximate result of the tort. The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn."

The plaintiff's evidence made out a case for the jury on actual damages. It was sufficient to support the amount fixed.

Under the Labor Management Relations Act of Congress, recovery is authorized "for the damages sustained and the cost of the suit." Damages sustained are limited to actual damages suffered as a result of the wrong inflicted. United Mine Workers v. Patton, 211 Fed. 2d 742. Punitive damages are never awarded as compensation. They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong. They are given to the plaintiff in a proper case, not because they are due, but because of the opportunity the case affords the court to inflict punishment for conduct intentionally wrongful.

The plaintiff has stated one cause of action and only one. It does not allege a breach of the peace. It does not allege violence. So far as the evidence discloses, the picketing and the refusal to handle exchange cargo were peaceful. The cause of action arose by reason of the defendant's unlawful activities and demands for a contract without its prior designation as the bargaining agent for the plaintiff's employees. In this particular field, the Federal authority is exclusive.

Admittedly, where a cause of action is asserted for a violent tort under State law and is coupled with a cause of action for violation of the Labor Management Relations Act, the State court may proceed to hear and determine both causes. The court may award punitive damages if authorized by State law in the case involving the State tort, but actual damages only may be awarded in the cause of action under the Labor Management Relations Act. The Federal courts recognize the right of the State court in a proper case to award punitive damages for a tort committed in violation of a right the State has recognized under its police power, although it is coupled with a separate Federal right, the jurisdiction over which is given to the State court by Congress. The joinder is permitted because the Act of Congress does not forbid it. San Diego Trade Council v. Garmon, 399 U.S. 236; United Automobile Workers v. Russell, 356 U.S. 634.

In the Garmon case the Supreme Court of the United States used this significant language: "It is true that we have allowed the States to grant compensation for the consequences as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. United Automobile Workers v. Russell, 356 U.S. 634; United Construction Workers v. Laburnum Corp., 347 U.S. 656. . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our Federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." (Citing International

Union v. Wisconsin Board, 336 U.S. 245.) In cases where punitive damages have been allowed, a cause of action under State law was alleged, founded on violence, threats of violence, and intimidation. United Mine Workers v. Osborne Mining Co., Inc., 279 Fed. 2d 716, *Certiorari* denied, 364 U.S. 881; Youngdahl v. Rainfair, Inc., 355 U.S. 131; Automobile Workers v. Wisconsin Employer Relations Board, 351 U.S. 266.

In this case the plaintiff's complaint fails to state any separate cause of action under State law based on violence. In view of the authorities here quoted, and others of like import we conclude the plaintiff's pleadings and evidence are insufficient to support an issue for punitive damages. Consequently the defendant's prayer for instructions should have been given. The exception based on its denial is sustained. The award of punitive damages is without a proper foundation and is stricken from the judgment. The record, however, does not disclose error in the award of actual damages.

As to Actual Damages—No Error.

As to Punitive Damages—Reversed.